(21)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 431

VINCENT RAYMOND DUNNE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.
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Of Counsel:

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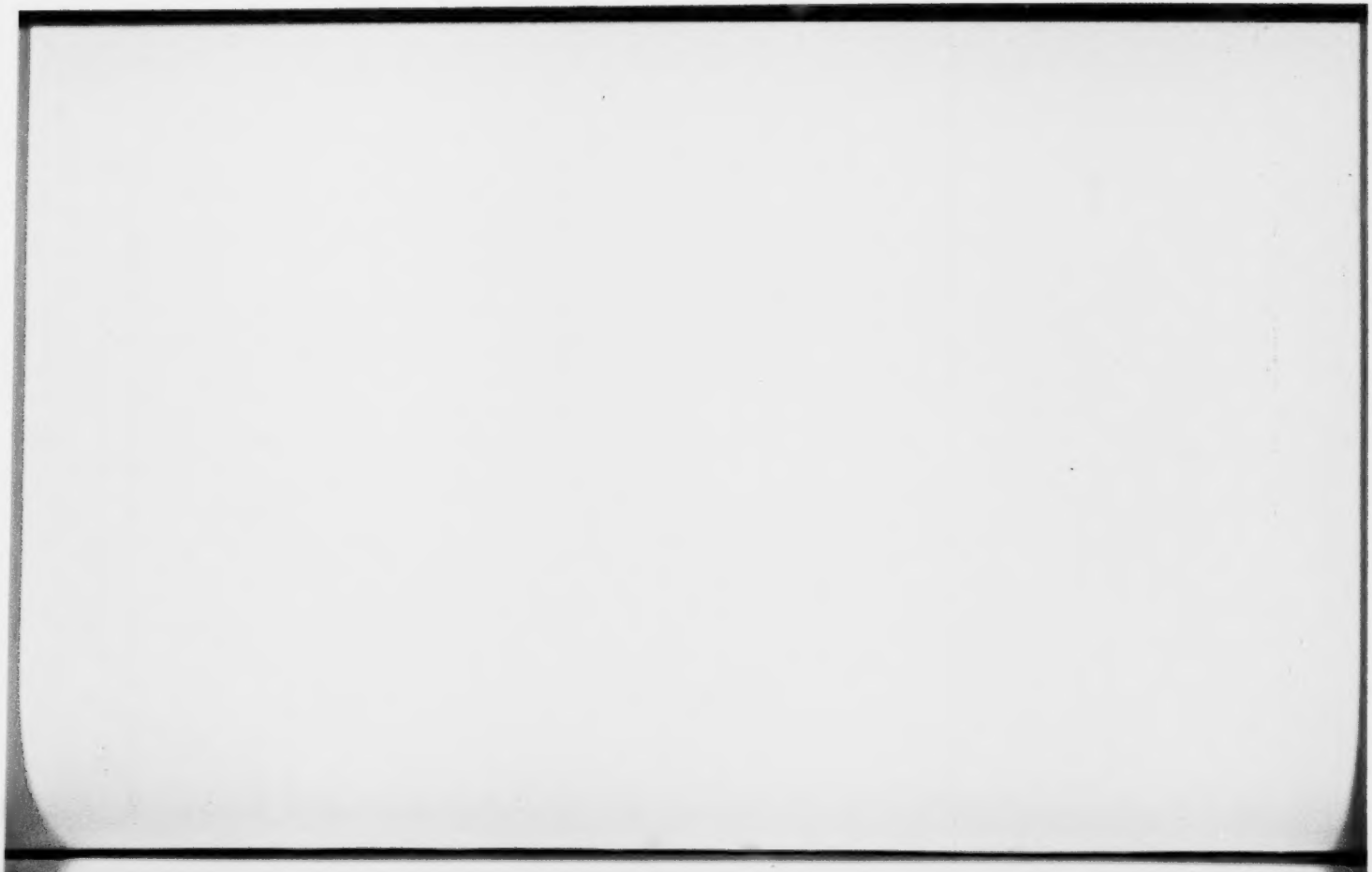

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Cases Cited

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BRIEF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

The American Civil Liberties Union as *amicus curiae* joins in this extraordinary request and respectfully urges this Court to reconsider its denial of the application for a writ of certiorari to the United States Circuit Court of Appeals, Eighth Circuit, to review a judgment of conviction of the petitioners under the 1940 Alien Registration Act because:

1. This Court has never ruled upon the validity of a federal peacetime sedition statute;

2. The 1940 Alien Registration Act as a peacetime sedition law violates the first amendment to the United States Constitution;

3. The denial of certiorari can only cause confusion among the members of the bar and the general public, since the decision of the Court below rejecting the rule in

Schenck v. *United States,* 247 U. S. 47, and relying upon the rule in *Gitlow* v. *New York,* 268 U. S. 612, appears to be in conflict with several recent opinions of this Court.

I

In 1798 Congress passed the Federal Alien and Sedition Act. Before the Alien Registration Act of 1940 this was the only peacetime sedition law in the history of the United States. At no previous time has this Court either had an opportunity or has ruled upon such a statute. The opposition of many of the leading statesmen of the United States to the 1798 Acts is a matter of public record. No more succinct statement as to the validity of those acts exists than the statement of Thomas Jefferson that these acts were "* * * an experiment of the American mind to see how far it will bear an avowed violation of the Constitution." Letter, Jefferson to S. T. Mason, October 11, 1798, from Beveridge, *The Life of John Marshall,* vol. 2, page 384.

Under these circumstances it becomes imperative that this Court express its opinion as to the validity of the present peacetime sedition statute to act as a guide.

II

The 1940 Alien Registration Act on its face violates the first amendment to the United States Constitution. This amendment is a prohibition upon the powers of Congress to enact any legislation which abridges the freedom of speech. It may well be that the war power of Congress will override certain limitations upon the powers of Congress—the *Schenck* case upheld the 1917 Federal Espionage Act. But this statute enacted in June 28, 1940 was a peacetime measure intended to be applied in peace-

time and will be effective after this war has been brought to a successful conclusion. The war power of Congress cannot be held to be so extended as to override such an abridgement of the first amendment in time of peace.

In cases involving a deprivation by statute of civil liberties, the presumption of constitutionality does not apply. *Schneider* v. *State,* 308 U. S. 147, 161, and *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, N. 4. Furthermore the statute is vague, indefinite and uncertain. It cannot be claimed that a person is appraised with any assurance as to exactly what language would fall within the purview of the act and subject the utterer to the severe penalties provided for. We believe it sound constitutional doctrine that where there is any doubt as to the extent and meaning of a federal statute attacked under the first amendment, such doubt shall be resolved against the government. See *Herndon* v. *Lowery,* 301 U. S. 242.

III

The court below based its opinion upon the rule in the *Gitlow* case and said, "* * * The nation * * * may * * * punish *utterances* which have a *tendency* to and are intended to produce the forbidden results * * *" 138 Fed. 2nd at 145. (Emphasis supplied.) Furthermore, the Circuit Court rejected as inapplicable the rule of the *Schenck* case, wherein this court set forth its formula that the question is "* * * whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils * * *".

The Gitlow formula is divided into two parts:

A. A presumption of validity extends to legislative enactments setting forth a substantive evil, and utterances coming within that prohibition are punishable (*Gitlow* case, pp. 668, 670).

To uphold uncritically such a contention would in effect destroy the guaranty of freedom of speech set forth in the first amendment to the Federal Constitution. As we have said above, this court recognized the validity of this argument in *Schneider* v. *State*, 308 U. S. 147, 161. Referring to the right of freedom of speech the court there stated that the "phrase is not an empty one and was not lightly used. * * * It stressed, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgement of these rights is asserted the courts should be astute to examine the effects of the challenged legislation." See also, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, N. 4.

The court below (p. 140) cites this important principal enunciated by this court but fails to realize its implications upon the *Gitlow* case.

B. Where the legislature sets a standard of substantive evil, *utterances* coming within that standard *tending* to produce that evil are punishable (*Gitlow* case, p. 667). (Emphasis supplied.)

But in *Herndon* v. *Lowry*, 301 U. S. 242, this court said at page 258 "* * * the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon the individual must have

appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution.''

Thus the utterances must more than *tend* to produce a substantive evil, they must create a "reasonable apprehension of danger to organized government." It should be noted at this point, that the jury refused to convict petitioners of any overt act; the government's evidence being only that they had purchased four rifles and formed a union defense guard.[1]

While accepting the Gitlow formula the Court below rejected specifically the applicability of the clear and present danger rule laid down in the *Schenck* case. It recognized a similarity between the 1940 Alien Registration Act and the 1917 statute upheld in the *Schenck* and similar cases, and said although these cases do not rule the present case yet "* * * it does not follow that those cases contain no expressions which are useful guides for determining the character of questions presented here * * *" (p. 140). Withal, the Circuit Court saw fit to reject completely the Schenck formula in favor of the Gitlow formula (p. 145).

This Court, however, recently in *Schneiderman* v. *U. S.*, 320 U. S. 118, at 157, convincingly set forth the enlarged applicability of the clear and present danger rule.

"There is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public disorder or other substantive evil, and *mere doctrinal justification* or prediction of the use of force under hypothetical conditions at some indefinite future time-predication that is not calcu-

1. Compare the action of the Supreme Court in *Fiske* v. *Kansas*, 274 U. S. 380, where literature of the IWW, similar in content to that involved here, was held protected by freedom of speech, and the Kansas Criminal Syndacalism Statute accordingly invalid as applied.

lated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason." (Emphasis supplied.) The Court cited *Bridges* v. *California,* 314 U. S. 252, the concurring opinion of Justice Brandeis in *Whitney* v. *California,* 274 U. S. 357, 372-280, and *Taylor* v. *Mississippi,* 319 U. S. 583.

In the *Bridges* case this Court said (p. 262): "* * * the 'clear and present danger' language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under Espionage Acts, *Schenck* v. *U. S., supra; Abrams* v. *U. S.,* 250 U. S. 616; under a Criminal Syndicalism Act, *Whitney* v. *California, supra;* under an 'Anti-Insurrection' Act, *Herndon* v. *Lowry, supra;* and for breach of the peace at common law, *Cantwell* v. *Connecticut, supra.* And very recently we have also suggested that 'clear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is 'destruction of life or property, or invasion of the right of privacy'. *Thornhill* v. *Alabama,* 310 U. S. 88, 105.

"Moreover, the likelihood however great, that a substantive evil will result cannot alone justify a restriction upon freedom of expression or the press."

In our opinion it is unreasonable in the extreme to claim or sustain the contention that the utterances charged against the petitioners could constitute a clear and present danger to the evils the statute purportedly is directed.

It is thus submitted that the opinion of the Court below is in conflict with opinions of this Court, and the refusal to review the case at bar will create confusion as to the status of the *Gitlow* and *Schenck* cases.

It is respectfully urged that this Court should grant the petition for certiorari prayed for.

Respectfully submitted,

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